



IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-930

DIXY LEE RAY, GOVERNOR OF THE STATE OF
WASHINGTON, ET AL., *Appellants,*

v.

ATLANTIC RICHFIELD CO., ET AL., *Appellees.*

On Appeal from the United States District Court for the
Western District of Washington

**BRIEF FOR THE AMERICAN INSTITUTE OF
MERCHANT SHIPPING AS AMICUS CURIAE**

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BRIEF FOR THE AMERICAN INSTITUTE OF
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INTEREST OF AMICUS CURIAE

The American Institute of Merchant Shipping (hereinafter "AIMS") has obtained and filed with the Clerk the consent of all parties to the filing of this brief.

AIMS is a non-profit association organized under the laws of the District of Columbia. Its membership includes 34 United States companies which operate over 340 ships, in the foreign, coastal and intercoastal trades, representing about 70 percent of all active privately-owned tonnage registered under the United States flag.

AIMS has played an active role in the development of international, national, and local rules affecting vessel operation, safety and pollution prevention. Maritime commerce is essentially a multinational activity, occurring predominantly in international waters. AIMS has, therefore, stressed the need to avoid the Balkanization of vessel regulation, which could substantially impair the free flow of commerce and make more difficult the achievement of safety and environmental goals that are dependent on international cooperation. AIMS has strongly supported the efforts of the Federal Government to establish uniform national regulations governing vessel operation which would be compatible with international conventions. During Congressional hearings on the Ports and Waterways Safety Act of 1972, 33 U.S.C. §§1221-1227 and 46 U.S.C. § 391a (Supp. V 1975), AIMS testified in favor of exclusive Federal regulation of vessel operations.¹

The State of Washington, however, has enacted legislation which severely restricts the operation of vessels in the Puget Sound area. This legislation, although enacted for the commendable purpose of reducing oil

¹ Hearings on H.R. 17830, H.R. 18047, H.R. 15710 before the Subcommittee on Coast Guard, Coast and Geodetic Survey and Navigation of the House Committee on Merchant Marine and Fisheries, 91st Cong., 2d Sess. 181-82 (1970).

pollution in Washington State waters, will conflict with the Federal Government's development and implementation of a uniform system of national regulation. Practices established by local jurisdictions are likely to be out of harmony with each other and would tend to foreclose options for Federal regulation, particularly if, as in the present case, they relate to vessel construction. Without Federal preemption in the area of vessel operation and design, the maritime industry would be faced with the prospect of uncontrolled proliferation of statutes similar to that enacted by Washington, raising not only the specter of mutual incompatibility but also the likelihood of severe restrictions on the efficient use of costly assets.

AIMS, therefore, files this *amicus* brief to urge that the Federal preeminence in the area of maritime commerce, especially as concerns vessel construction and operation, be upheld. The judgment of the District Court overturning the Washington State legislation should be affirmed.

QUESTIONS PRESENTED

1. Whether, where Congress has granted comprehensive authority to the Coast Guard to regulate oil tankers with respect to operation in port areas and with respect to construction and equipment standards, reserving to the states the right to prescribe higher standards for structures (but not for vessels), the State of Washington is precluded by the Supremacy Clause of the United States Constitution from enacting legislation regulating oil tanker operations in Puget Sound and imposing oil tanker design and equipment standards?

2. Whether the Commerce Clause of the United States Constitution precludes the State of Washington from prohibiting certain vessels from using navigable waters of the United States to engage in interstate and foreign commerce and from placing discriminatory burdens on certain other vessels in interstate and foreign commerce unless those vessels comply with prescribed design and equipment standards?

3. Whether the foreign relations authority of the Federal Government restricts the State of Washington from imposing restrictions on the operation of oil tankers that are inconsistent with international standards?

SUMMARY OF ARGUMENT

The State of Washington has enacted legislation excluding from Puget Sound all oil tankers in excess of 125,000 deadweight tons and establishing minimum design and construction standards for oil tankers between 40,000 and 125,000 deadweight tons. If a tanker in this size range does not comply with the minimum requirements, it must employ tug escorts while navigating the waters of Puget Sound. Washington has justified these restrictions on the grounds that they are necessary to protect Puget Sound from oil pollution casualties.

I

A. The Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1221-1227, 46 U.S.C. § 391a (Supp. V 1975), which authorizes the Coast Guard to regulate vessel operations in port areas and to impose design and equipment standards for oil tankers, contains express

language indicating that the scheme of vessel regulation established by Federal law was to be exclusive. The Washington legislation is invalid because it occupies the same area covered by the Ports and Waterways Safety Act of 1972 and thus directly interferes with the exclusive Federal system of regulation.

1. Congress provided, in Section 102(b) of the Ports and Waterways Safety Act of 1972, 33 U.S.C. § 1222(b), that states could prescribe standards higher than those set by the Federal Government with respect to "structures only," intentionally excluding a grant of authority to the states to regulate vessels. The legislative history of that provision includes a statement that Section 102(b) was intended to preempt the area of vessel regulation and that "state regulation of vessels is not contemplated." H.R. REP. No. 92-563, 92d Cong., 1st Sess. (1971) at 15. As a consequence, Washington is precluded from imposing limitations on the entry of oil tankers into Puget Sound.

2. Title II of the Ports and Waterways Safety Act of 1972 authorizes the Coast Guard, in consultation with the Maritime Administration and the Environmental Protection Agency, to promulgate design and equipment standards. Section 201, 49 U.S.C. § 391a(3), (4). Title II makes no reference to any state participation in this area. Exclusion of state action in this area is consistent with decisions by this Court, which, although recognizing some state authority over vessels in interstate and foreign commerce, have uniformly refrained from sanctioning local imposition of design and equipment standards. See *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Kelly v. Washington*, 302 U.S. 1

(1937). As a consequence, Washington is precluded from imposing limitations on oil tanker operations based on design or equipment standards.

3. Under the Ports and Waterways Safety Act of 1972, the Coast Guard has been authorized to establish comprehensive rules and regulations for the movement of oil tankers in United States port areas, to limit the size of vessels entering port areas where hazardous conditions so require, to restrict vessel operations in port areas under hazardous circumstances to those having certain operating characteristics and capabilities and to establish design and equipment standards for all vessels entering United States waters. The Coast Guard is directed to use its authority with the specific objective of protecting navigable waters and resources therein from environmental harm. 33 U.S.C. § 1221, 46 U.S.C. § 391a(1). Under this authority, the Coast Guard has promulgated specific rules for Puget Sound, 33 C.F.R. Part 161, Subpart B, and has promulgated design and equipment requirements under 33 C.F.R. Part 157 amended at 41 Fed. Reg. 54177, December 3, 1976. Thus, the Federal scheme fully covers the areas attempted to be regulated by the State of Washington.

B. The Federal Government has preeminent responsibility for maritime matters, and states are not permitted to enact legislation in this area unless Congress has expressly or by implication indicated its willingness to allow state action in a particular area. Where states have acted to control the so-called local aspects of maritime law, their action has been premised on the existence of statutory authority, or, in the absence of express statutory authority, the lack of any Federal legislation governing the area and a determination that the local regulation would not interfere with areas

requiring uniformity. *Kelly v. Washington*, 302 U.S. 1 (1937). In the present case, Congress has enacted legislation in the area under consideration, which recognizes the desirability of uniform regulation of oil tanker operations and construction and design standards, thus precluding state legislation in this area.

II

Washington's legislation is invalid under the Commerce Clause of the United States Constitution because it applies primarily and specifically to instrumentalities of interstate and foreign commerce and as a consequence cannot be regarded as a local measure. The Washington legislation imposes significant economic burdens on the transportation of oil into the Puget Sound area. This burden, which has an annual cost in the millions of dollars, cannot be minimized by describing it as merely a few cents per barrel of oil transported. Finally, the areas of vessel design and construction and the regulation of vessel operation require a uniformity throughout the United States and, if possible, throughout the world. Such uniformity can only be achieved through regulation at the national level and through international agreement implemented by the Federal Government.

III

The Washington legislation is also a severe infringement upon the power of the Federal Government to conduct foreign affairs of the United States. The United States has actively and aggressively sought to develop international standards that would protect the world's ocean from the harmful effect of oil pollution. One of the more recent results of this effort has been the conclusion of an international agreement at

the end of 1973 establishing international standards for vessel operation and for vessel design and equipment, that are similar to those contemplated under the Federal Ports and Waterways Safety Act of 1972. President Carter on March 22, 1977, submitted this convention to the Senate for Advice and Consent. Action by the State of Washington to impose standards that are inconsistent with the provisions of this convention will undermine the efficacy of international solutions to the detriment of the general interest of the United States.

For all of the above reasons, the judgment of the District Court that the Washington legislation is invalid should be affirmed.

ARGUMENT

I. WASHINGTON IS PRECLUDED FROM ENACTING LEGISLATION IMPOSING DESIGN AND CONSTRUCTION STANDARDS AND LIMITING THE OPERATIONS OF OIL TANKERS IN PUGET SOUND BECAUSE THESE MATTERS ARE COVERED BY COMPREHENSIVE FEDERAL LEGISLATION WHICH WAS INTENDED BY CONGRESS TO BE EXCLUSIVE.

The focus of this case is Chapter 125, Laws of the State of Washington, 1975, First Extraordinary Session, Codified at Wash. Rev. Code §§ 88.16.170-.190 (Supp. 1976) ("Tanker Law"), which (1) completely excludes approximately 60 per cent of the existing tonnage of the world's tanker fleet—tankers exceeding 125,000 dwt—from Puget Sound (A.58, ¶52),² and (2) requires those between 40,000 and 125,000 dwt to employ a battery of tug escorts while in Puget Sound,

² References to "A." are to the appendix filed with the Appellant's brief.

unless they comply with stringent statutory construction and equipment requirements and any additional such requirements that may be imposed by regulation (A.43, ¶10). The State of Washington maintains that these restrictions are necessary to protect Puget Sound from the irreparable harm of oil pollution.

Examination of the Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1221-1227, 46 U.S.C. § 391a (Supp. V 1975), demonstrates that Congress intended to preclude states from enacting legislation such as the Washington Tanker Law and that Congress intended that the regulation of oil tankers in port areas and the imposition of design and construction standards be within the exclusive authority of the Federal Government, particularly the Coast Guard.

A. The Intent of Congress That Federal Regulations Be Exclusive Is Evident from the Language and Legislative History of the Ports and Waterways Safety Act of 1972.

1. Section 102(b) of the Ports and Waterways Safety Act of 1972 authorizes the Coast Guard to exercise exclusive control over oil tanker operations in Puget Sound and precludes state regulation in this area.

The intention of Congress to preempt state action with respect to matters covered by the Ports and Waterways Safety Act of 1972 is evident in both the language of the statute and its legislative history. Title I, which provides the broad authority for the Coast Guard to control oil tanker operations in United States port areas, limits the area of permitted state action to prescription of higher standards for structures but not for vessels. Section 102(b) provides:

(b) Nothing contained in this title . . . prevent[s] a State or political subdivision thereof

from prescribing *for structures only* higher safety equipment requirements or safety standards than those which may be prescribed pursuant to this title. 33 U.S.C. § 1222(b). (Emphasis added).

Title I authorizes regulation both of shore-based structures and vessels, and Section 102(b) is a clear statement that the vessel portion of Title I is reserved to the Federal Government. The legislative history of this provision confirms this conclusion. The House Report contains the following statement on the reasons for including Section 102(b):

This amendment was suggested since it was felt that H.R. 8140 does not make it absolutely clear that the Coast Guard regulation of vessels preempts state action in this field. The inserted language is a positive statement retaining State jurisdiction over structures and making clear that State regulation of vessels is not contemplated. H.R. REP. NO. 92-563, 92d Cong. 1st Sess. at 15 (1971).

The preemptive language in Section 102(b) of Title I precludes the State of Washington from asserting that cases such as *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 245 (1829), and *Cooley v. Board of Wardens*, 12 How. 299 (1851), authorize the establishment of State regulation of vessels with respect to matters covered by the Port and Waterways Safety Act of 1972. Section 102(b) makes it clear that regulation of oil tankers for the purpose of preventing pollution is not a local matter and makes it unnecessary for this Court to fashion a boundary between local and national authority in this case, since that line has been expressly drawn by Congress.

2. The provisions of the Ports and Waterways Safety Act of 1972 authorizing the imposition of design and equipment standards provide no authority for independent or supplemental state action.

Title II of the Ports and Waterways Safety Act of 1972 authorizes the Coast Guard, in consultation with the Maritime Administration and the Environmental Protection Agency, to establish design and equipment standards for oil tankers. 46 U.S.C. § 391a(3), (4). No provision is made for state action in this area.

As a general principle, any state regulation of physical configuration that prevents the free movement of interstate and foreign commerce is barred by the Commerce Clause. *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). In the maritime area this Court, in reviewing the right of individual states to regulate the operation of vessels engaged in foreign and interstate commerce, has clearly indicated that the right of regulation does not extend to construction requirements.

In *Kelly v. Washington*, 302 U.S. 1 (1937), the imposition of safety regulations on tugboats operating in the waters of the State of Washington was permitted because Federal law did not apply to those vessels. With respect to construction requirements, this Court added:

For example, Congress may establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the States. The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, California another, and so on. 301 U.S. 1, 14-15.

In *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), the application of an air pollution ordinance to vessels docked in the jurisdiction of Detroit was upheld. The Detroit Smoke Abatement Code did not impose any specific structural requirements but only required that smoke emitted from the vessels' boilers not exceed in density or duration the maximum standards allowable under the Detroit Smoke Abatement Code. *Id.* at 441.

In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), state laws regarding oil pollution liability were sustained. The statute in question also contained a requirement for "containment gear." This Court, although deferring consideration of the legality of this requirement until an actual dispute arose, indicated that such a requirement could be "*per se* invalid because the subject to be regulated requires uniform federal regulation." 411 U.S. 325, 337.

In light of the well established principle that imposition of design and equipment standards for vessels is outside the constitutional authority of individual states, state action in this area can only be justified if expressly provided for in Title II. Title II contains no such provision, and consequently those portions of the Washington Tanker Law that impose limitations on oil tankers based on design and equipment standards are invalid.

3. The Ports and Waterways Safety Act of 1972 provides broad authority to regulate oil tanker operation in port areas and to impose design and equipment standards, expressly covering the areas regulated by the Washington Tanker Law.

The Ports and Waterways Safety Act of 1972 expressly confers upon the Coast Guard the responsibility

for regulating all aspects of oil tanker operation in port areas that relate to environmental hazards such as oil pollution.

In carrying out its responsibility for environmental protection, the Coast Guard is authorized under Title I of the Ports and Waterways Safety Act of 1972 to:

(1) establish, operate, and maintain vessel traffic services and systems for ports, harbors, and other waters subject to congested vessel traffic;

(2) require vessels which operate in an area of a vessel traffic service or system to utilize or comply with that service or system, including the carrying or installation of electronic or other devices necessary for the use of the service or system;

(3) control vessel traffic in areas which [is determined] to be especially hazardous, or under conditions of reduced visibility, adverse weather, vessel congestion, or other hazardous circumstances by—

(i) specifying times of entry, movement, or departure to, from, within, or through ports, harbors, or other waters;

(ii) establishing vessel traffic routing schemes;

(iii) establishing vessel size and speed limitations and vessel operating conditions; and

(iv) restricting vessel operation, in a hazardous area or under hazardous conditions, to vessels which have particular operating characteristics and capabilities which [is considered] necessary for safe operation under the circumstances;

(4) direct the anchoring, mooring, or movement of a vessel when necessary to prevent damage to

or by that vessel or her cargo, stores, supplies, or fuel;

(5) require pilots on self-propelled vessels engaged in the foreign trades in areas and under circumstances where a pilot is not otherwise required by State law to be on board until the State having jurisdiction of an area involved establishes a requirement for a pilot in that area or under the circumstances involved, 33 U.S.C. §1221 (Supp. V 1975).

Under Title I, the Coast Guard can exclude an oil tanker from areas such as Puget Sound if safety or environmental conditions require and the Coast Guard officer serving as Captain of the Port has been authorized to exercise this authority (33 C.F.R. Part 160). Title I also expressly authorizes the Coast Guard to limit operations in areas such as Puget Sound to those oil tankers that have particular characteristics and capabilities when there are hazardous circumstances. This authority would include the imposition of tug escorts where deemed necessary.

Thus, Title I of the Ports and Waterways Safety Act of 1972 confers on the Coast Guard responsibility for determining whether and under what circumstances an oil tanker can enter a United States port and authority for controlling the navigation of oil tankers in port areas. Pursuant to this authority, the Coast Guard has adopted a specific plan for the Puget Sound area. 33 C.F.R. Part 161, Subpart B.

In addition to its authority to regulate the operation of oil tankers in port areas, the Coast Guard has broad general authority under Title II of the Ports and

Waterways Safety Act of 1972 to prescribe design and construction standards for oil tankers.³

Title II authorizes the Coast Guard to impose on oil tankers any and all of the design and equipment requirements found in the Washington Tanker Law. The Coast Guard has exercised this authority by establishing design and equipment standards for vessels carrying oil in the domestic trade, 33 C.F.R. Part 157, and

³ The pertinent provisions of the Act are as follows:

a) In order to secure effective provisions (A) for vessel safety, and (B) for protection of the marine environment [the Coast Guard] shall establish for the vessels to which this section applies such additional rules and regulations as may be necessary with respect to the design and construction, alteration, repair, and maintenance of such vessels, including, but not limited to, the superstructures, hulls, places for stowing and carrying such cargo, fittings, equipment, appliances, propulsive machinery, auxiliary machinery, and boilers thereof; In establishing such rules and regulations the Secretary shall, after consultation with the Secretary of Commerce and the Administrator of the Environmental Protection Agency, identify those established for protection of the marine environment and those established for vessel safety. 46 U.S.C. § 391a (3) (Supp. V 1975).

b) Before any rules or regulations, or any alteration, amendment, or repeal thereof, are approved by the Secretary under the provisions of this section, except in an emergency, the Secretary shall (A) consult with other appropriate Federal departments and agencies, and particularly with the Administrator of the Environmental Protection Agency and the Secretary of Commerce, with regard to all rules and regulations for the protection of the marine environment, (B) publish proposed rules and regulations, and (C) permit interested persons an opportunity for hearing. In prescribing rules or regulations, the Secretary shall consider, among other things, (i) the need for such rules or regulations, (ii) the extent to which such rules or regulations will contribute to safety or protection of the marine environment, and (iii) the practicability of compliance therewith, including cost and technical feasibility. 46 U.S.C. 391a(4) (Supp. V 1975).

has recently proposed expanding these regulations to require segregated ballast tanks and, for new buildings, double bottoms for all oil tankers in excess of 20,000 dwt calling at United States ports. 42 Fed. Reg. 24868, May 16, 1977. It is important to note that under Title II, these design and equipment regulations can be imposed only after consultation with the Commerce Department (which contains the Maritime Administration) and the Environmental Protection Agency and after taking into account factors relating to efficacy, cost and technical feasibility. 46 U.S.C. § 391a(3), (4). This coordination requirement demonstrates that Congress intended that the synthesizing of competing policy considerations and the determinations of technical matters be carried out at the national level.

The comprehensive nature of the Ports and Waterways Safety Act of 1972 further evidences the intent of the Congress to preempt state regulation. As outlined above, the Ports and Waterways Safety Act of 1972 confers broad authority upon the Coast Guard to establish a comprehensive Federal regulatory system governing oil tanker operations and design, specifically focusing on the elimination of oil pollution and other environmental hazards. The Coast Guard has in fact developed regulations to control oil tanker navigation in United States port areas such as Puget Sound, 33 C.F.R. Part 161, Subpart B, and to regulate oil tanker design and equipment. 33 C.F.R. Part 157. Under this scheme, there is no room for independent action by the State of Washington relating to these same areas.

The structure and legislative history of the Ports and Waterways Safety Act of 1972 indicate that Congress intended to establish a uniform and national system of regulation. Where such intent is clear, action by the

State of Washington in the same area is not permitted. *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973). Where the Congress has taken such preemptive action, it is not necessary to examine state legislation to determine whether there is a direct conflict. Whether or not a conflict now exists, state legislation in an area preempted by Federal action is an impermissible intrusion. The principle that a state law is valid unless it directly conflicts with a Federal law is only applicable where Congress has not acted to foreclose state activity in the area. See *Douglas v. Seacoast Products*, Slip op. (May 23, 1977); *Rath v. Jones*, Slip op. (March 29, 1977).

B. The Federal Government Has Preeminent Authority over Maritime Regulation and the State of Washington May Not Regulate this Area Absent Express or Implied Federal Consent.

The preeminent authority of the Federal Government to regulate maritime matters is constitutional, flowing from the Commerce Clause, Article I, § 8, Clause 3, *Gibbons v. Ogden*, 9 Wheat. 1 (1824), and the grant of the admiralty and maritime jurisdiction to the Federal courts, Article III, § 2. *Ex Parte Garnett*, 141 U.S. 1, 14 (1891). The preeminent Federal authority is necessary to maintain the uniformity of the maritime law. State and local legislation that would undermine this uniformity has been invalidated on many occasions. See, e.g., *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 219 (1917); *Workman v. City of New York*, 179 U.S. 552 (1900); *Butler v. Boston & Savannah Steamship Co.*, 130 U.S. 527 (1889).

Although *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), has qualified the principle of *Southern Pacific v. Jensen*, *supra*, that Federal authority over all maritime matters is exclusive, Federal authority over the regulation of vessel operation, design and equipment is still paramount. *Askew* indicated that *Jensen* should not be read to prevent states from enacting legislation relating to damages that occur to the territory of a state, but expressly recognized the continued exclusivity of Federal jurisdiction with respect to those aspects relating to vessels plying the high seas and United States navigable waters. *Id.* at 344.

Although the broad structure of the maritime law must be national, Congress has on occasion recognized the need for local regulation of some matters affecting maritime commerce and navigation. But when Congress has considered that local regulation was appropriate, the legislation enacted by Congress has included an express provision for such local regulation.

Such express Congressional allocation of authority for specific admiralty and maritime matters dates from the first days of our government. During its first session, Congress authorized local regulation of pilotage in the bays, rivers, and ports of the United States on a temporary basis "until further legislative provisions are made by Congress." An Act of Congress, August 7, 1789, Ch. 9, § 4, 1 Stat. 54 (current version at 46 U.S.C. § 211 (1970)). This assignment of a maritime responsibility to the states was upheld against the challenge that it was beyond the authority of the Federal Government to delegate and that it violated the Commerce Clause. *Cooley v. Board of Wardens*, *supra*. Subsequent Congressional legislation has returned much of this regulatory authority to the

Federal Government, Act of Feb. 28, 1871, Ch. 100, § 51, 16 Stat. 455, 46 U.S.C. §§ 215, 364 (1970), leaving to the states control only over pilots for registered vessels (vessels engaged in foreign commerce). *Anderson v. Pacific Coast Steamship Co.*, 225 U.S. 187 (1912).

At that same first session, Section 9 of the Judiciary Act of 1789, providing for the exclusive admiralty and maritime jurisdiction in the Federal district courts, saved to all suitors their common law remedies. 1 Stat. 76-77 (1789) (current version at 28 U.S.C. § 1333 (1970)). Under this savings clause, a state legislature can add to the body of remedies available through statutory enactments. *Old Dominion Steamship Co. v. Gilmore*, 207 U.S. 398 (1907); *American Steamboat Company v. Chace*, 16 Wall. 522, 533-34 (1873).

Even in the environmental area, the Congress has continued this pattern of specific delegation of authority for state regulation affecting maritime commerce. The Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (Supp. V 1975), provides for state participation in the development of a comprehensive pollution prevention program, 33 U.S.C. § 1252, and in the implementation of those programs, 33 U.S.C. §§ 1254-1265. That legislation also provides for recovery of oil pollution damages incurred by the Federal Government, but leaves to the states the development of the legal rules governing damages to the interests of the states or their residents, 33 U.S.C. § 1321(o)(2). Because of the express statutory acknowledgement of state authority, this Court upheld the State of Florida's oil pollution liability law, *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), recognizing there, as in the saving-to-suitors clause, the

right of states to add to the remedies available under the maritime law where Congress's intent that they do so was manifest.

The Estuarine Act of 1968 recognizes state jurisdiction over hunting and fishing laws and regulations, 16 U.S.C. §§ 1221-1226 (1970), and the Deepwater Ports Act of 1974 provides for state authority to impose additional liability for any discharge of oil from a deepwater port or a vessel within any safety zone. 33 U.S.C. § 1517(k) (Supp. V 1975). None of the above delegations to the states included the authority to regulate vessel operation or design.

In making these allocations to the states of regulatory authority in the maritime area, Congress has made specific determinations that there is a need for local participation in a particular area. In the Ports and Waterways Safety Act of 1972, however, there is no provision authorizing state regulation of oil tankers. By not providing for state regulation, the Congress has retained this area of maritime regulation within the exclusive domain of the Federal Government.

Although there have been cases where local regulation of matters affecting maritime law and maritime commerce has been sustained even though there has been no express delegation by Congress in the area, these cases are limited to regulations that are within the traditional authority of local jurisdictions and that would not have an adverse impact on the uniformity of the maritime law. *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); *Just v. Chambers*, 312 U.S. 383, 389-90 (1941); *Kelly v. Washington*, 302 U.S. 1 (1937); *City of Norwalk*, 55 F. 98, 107-08 (1893). The silence of Congress in not enacting legislation in a particular area may be construed as an implied consent for

local regulation in that area. *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 313-14 (1955). But for a state to rely on the implied consent or acquiescence of Congress, it must show that there has been no Federal legislation in the area and that the state's action would not disrupt those portions of the maritime law requiring uniform rules.

Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960), represents a blending of these principles. In that case this Court relied on the express Congressional recognition of local responsibility for air pollution control coupled with the absence of any air pollution control provisions in the Federal legislation providing for vessel inspection. *Id.* at 445-446.

In this case, the State of Washington is not justified in claiming a right to regulate vessel operation and impose construction and design standards on the basis of the police power. First, Congress has enacted legislation in this area which expressly limits the role of the states to providing higher standards for structures only.⁴ Second, by establishing a comprehensive system of vessel regulation for the purpose of preventing environmental damage and by excluding from that system any authority for local jurisdictions to supplement it, Congress has reserved to the Federal Government the exclusive authority to regulate in this area. Third, even if this area were not expressly reserved to the Federal Government, the need to have uniformity in

⁴ The Ports and Waterways Safety Act of 1972 contains language acknowledging that some localities had imposed local rules relating to port operation prior to the enactment of Federal legislation in the area. 33 U.S.C. § 1222(e)(6). It was expressly intended that these local systems give way to the new system designed by the Coast Guard. 33 U.S.C. § 1222(b).

vessel design and construction standards would prohibit local jurisdictions from enforcing legislation of that nature.

The assertion of police power authority to protect the environment cannot expand the limited scope of state authority to regulate maritime matters in an area covered by Federal legislation. As this Court has recently noted, a state cannot escape the Constitutional and statutory limitations on its authority "by cloaking objectionable legislation in the currently fashionable garb of environmental protection." *Douglas v. Seacoast Products, Inc.*, Slip op., at 19 n. 21 (May 23, 1977).

II. THE WASHINGTON TANKER LAW IMPOSES AN UNCONSTITUTIONAL BURDEN ON INTERSTATE AND FOREIGN COMMERCE BY EXCLUDING CERTAIN VESSELS FROM PUGET SOUND AND BY IMPOSING UNJUSTIFIED AND DISCRIMINATORY CONDITIONS ON THE ENTRY OF CERTAIN OTHER VESSELS INTO PUGET SOUND.

Should this Court find that the Washington Tanker Law has not been preempted by the Ports and Waterways Safety Act of 1972, the Washington Tanker Law would nevertheless be invalid under the Commerce Clause of the United States Constitution.

This Court has consistently interpreted the Commerce Clause (Art. I, § 8, Clause 3) as establishing in the Federal Government the plenary authority to regulate foreign and interstate commerce. This principle was initially elaborated in an opinion by Chief Justice Marshall, holding navigation to be encompassed in the commerce power. *Gibbons v. Ogden*, 9 Wheat. 1 (1824). It has been recognized that this broad power

in the Federal Government does not prevent a state from enacting regulations of a local nature, particularly where police functions relating to the health and safety of a state's citizens are concerned, even though such regulation may have some effect on navigation involving foreign and interstate commerce. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

However, to fall within this police power exception, it must be established (1) that the regulation is primarily local and only incidentally affects interstate and foreign commerce, (2) that the burden it places on interstate and foreign commerce is not significant, and (3) that there is no need for a uniform system of regulation in the area. The Washington Tanker Law fails to meet any one of these criteria, much less all three.

A. The Tanker Law Has No Apparent Local Impact and Is Primarily and Specifically Designed to Regulate Foreign and Interstate Commerce.

Although this Court has permitted States to impose exclusionary regulations, it has done so only upon demonstration that such exclusions will have equal application to local interests. *South Carolina Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177 (1938). The mere fact that a state is attempting to protect local interests does not make regulations for that purpose local if its impact is solely, or even predominantly, on foreign and interstate commerce.

In *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), this Court upheld the application of a Detroit smoke control ordinance to a vessel engaged in interstate commerce. This is an example of a local regulation whose primary impact was to control emis-

sions from sources permanently located in Detroit. The application of these same standards to an emission source transiting Detroit's jurisdiction was incidental to the primary impact of the regulation.

The Washington Tanker Law, on the other hand, is expressly directed at vessels that are in interstate and foreign commerce, and there is no suggestion in the record that this law will affect any purely local transactions in the State of Washington. No showing of local applications can be made either with respect to the exclusion of tankers in excess of 125,000 dwt or to the requirement that vessels that do not meet certain design and equipment standards engage Washington-based tug operators. In fact, the statistics concerning the flow of oil in and out of Puget Sound indicate that the only impact will be on foreign and interstate commerce (A. 45-49, ¶¶ 16-22).

B. The Tanker Law Places a Significant Burden On Interstate and Foreign Commerce by Restricting the Efficient Utilization of Oil Tankers in Excess of 125,000 Deadweight Tons and by Imposing Unnecessary Costs on Other Oil Tankers.

Although the economic impact of the Washington Tanker Law cannot be precisely calculated, it is most misleading to measure the costs on the basis of additional expense per barrel of oil transported or as a percentage of the total cost of transportation. The relevant measure is the absolute costs of complying with the Washington Tanker Law and these costs are quite significant.

Each portion of the Washington Tanker Law has its own cost impact. The exclusion of oil tankers in

excess of 125,000 dwt increases the projected operating cost for tankers operating between Alaska and Washington by about \$3,000,000 per year by 1978 (based on \$.04 per barrel differential between a 120,000 dwt and a 150,000 dwt tanker (A. 64, ¶ 68) x 213,000 bpd (A. 49, ¶ 21) x 365 days).

The requirement to meet design and equipment standards could run to about \$8 or \$9 million per vessel (based on a tanker cost of \$80 million (A.55, ¶ 39) x an estimated cost increase of 11% (A.62, ¶ 63)).

The requirement that tugs be used in lieu of complying with the design and equipment standards has been estimated to cost in excess of a quarter of a million dollars per year just with respect to Atlantic Richfield (A.68, ¶ 78).

Thus, the aggregate cost of complying with the Washington Tanker Law is substantial and that cost is not in any way reduced merely by describing it as so many pennies per barrel of oil transported.

C. Regulation of Tanker Construction and Equipment Requires Uniformity.

Although Washington has tried to downplay the impact of the section of its Tanker Law that establishes design and equipment standards, that aspect of the law is inextricably linked with the requirement to employ tug escorts. By imposing economic penalties and operational limitations on oil tankers that do not meet prescribed design and equipment standards, Washington's Tanker Law is in effect regulating these areas. Such actions interfere with the development of uniform national and international standards.

The case for uniformity in design and construction requirements is evident. Oil tankers trade throughout the world. Since tankers are frequently chartered for only a single voyage at a time, they are invariably employed in many of the major tanker routes during their life span. This movement is similar to the interstate movement of tractor-trailers considered by this Court in *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959). If every state, not to mention every port area such as Puget Sound, imposed its own design and construction standards, the flexibility in deployment of tankers would be seriously impaired. One can easily imagine a case where a vessel constructed to meet the criteria of one port would thereby automatically be excluded from another port. For example, under the Washington Tanker Law, a tanker between 40,000 and 125,000 dwt is required to have a double bottom, twin screws and shaft horsepower equal to one horsepower to each two-and-one-half dwt. If a vessel were built to these specifications, it would have no assurance that it could enter Alaskan waters, since legislation enacted by Alaska requires the use of tug escorts unless the vessel has lateral bow thrusters, redundant boilers and either controllable pitch propellers or a stern horsepower equal to 40% of forward horsepower. Alaska Tanker Law, Alaska Stat. § 30.20.020.⁵

The very different approaches reflected by Washington's Tanker Law and the Alaska Tanker Law is convincing evidence that states are unlikely to develop compatible systems of regulation.

⁵ The constitutionality of the Alaska law has not yet been challenged, but it appears that it is subject to the same objections as those raised in this challenge to the Washington Tanker Law.

Pollution prevention is a technically complex problem, encompassing the standard problems of navigation and, in addition, the special problems of oil carriage. The ballasting and de-ballasting operations create a problem of minor but regular oil discharges while the accidental grounding or collision creates the possibility of a concentrated discharge. Because of the technical complexities, there are differing opinions as to the most effective methods of reducing oil discharge. Imposition of pollution prevention measures will have an impact on energy consumption, human safety, and economic activity, and thus the adoption of a system of regulation will require the establishment of priorities. If coastal states are given a free rein to make technical determinations and to establish priorities, they are likely to impose incompatible construction and equipment requirements. Such a hodgepodge of regulation could easily operate to prohibit a tanker from serving more than one port and to increase the cost of construction and operation of tankers.

These inefficiencies involve costs that must be recognized and justified. These costs are more than mere numbers that appear on the financial statements of the tanker owners; they represent expenditures of valuable resources—energy, raw materials, labor and capital—and it is in the interest of all that these resources be used wisely. For this reason, mandatory construction and equipment standards should be established and implemented in an efficient manner. Where a uniform system of tanker regulation has been established by the Coast Guard under the Ports and Waterways Safety Act of 1972, multiple systems of state regulation are wasteful and undeniably contrary to the Constitutional

principles prohibiting the imposition of such burdens on foreign and interstate commerce.

The substantial inefficiencies created by the Washington Tanker Law are clearly seen when their impact is compared with two landmark cases involving the attempt of states to regulate physical configuration of equipment used in interstate transportation. In *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), the court struck down an Arizona law that prohibited trains in excess of 70 cars from transiting the state. The court noted such a limit would require the railroad to run additional trains through Arizona and that this was an impermissible burden for Arizona to place on the railroad. The impact of the Washington Tanker Law in excluding tankers in excess of 125,000 dwt is much more severe than the requirement that Southern Pacific uncouple a few cars and bring them through Arizona on another locomotive. It is impossible for a 190,000 dwt tanker to "uncouple" 65,000 dwt and leave them out in the Pacific while the remaining 125,000 dwt comes into Puget Sound.

In *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959), the Supreme Court struck down an Illinois statute requiring contour mudguards on tractor-trailers, noting that 45 other states permitted straight mudguards and that tractor-trailers had to be free to move from state to state. The burden of changing mudguards at the Illinois border is *de minimis* compared with the necessity of reconstructing a tanker to comply with the Washington Tanker Law.

III. THE WASHINGTON TANKER LAW, BY APPLYING STANDARDS AND REQUIREMENTS THAT HAVE NOT BEEN ACCEPTED INTERNATIONALLY, UNCONSTITUTIONALLY INTERFERES WITH THE CONDUCT OF FOREIGN RELATIONS BY THE EXECUTIVE BRANCH.

The United States has been a leader in establishing a legal regime for the high seas based on uniformity. The United States was a major contributor to the 1948 Geneva Conventions on the high seas, the continental shelf, and the territorial sea and contiguous zone, and is currently a party to those treaties (13 U.S.T. 2312, 15 U.S.T. 471, 15 U.S.T. 1606). International negotiations for revised conventions in these areas are currently under way and the United States has been a vigorous supporter of the necessity of legal uniformity in all sectors, including the regulation of maritime commerce and pollution control.

Maritime commerce occurs for the most part on the high seas, outside the territorial jurisdiction of any nation. As a consequence, international standards relating to safety and pollution avoidance are a prerequisite to any meaningful attempt to control oil pollution in the oceans. Through the development of internationally agreed standards each nation is able to impose on vessels that fly its flag or enter its ports regulations that are in harmony with those imposed by other nations and which protect the mutual interest of all maritime nations. The United States has been committed to the development of international agreements, particularly in the area of safety and pollution prevention and control, and has been a vocal advocate of this view in many international conferences and negotiations. This commitment continues to influence the policy decisions of the United States in developing regulations for tanker construction and operation.

Environmental Impact Statement prepared by the Coast Guard, dated August 15, 1975 (hereinafter "EIS", A. 215-224).

A specialized agency of the United Nations, the International Maritime Consultative Organization (IMCO), has, since it began operation in 1959, provided a forum for the development of international agreements relating to vessel construction and operation. These agreements pertain to general safety, e.g. the International Convention for the Safety of Life at Sea, 16 U.S.T. 185, International Convention on Load Lines, 18 U.S.T. 1857, International Regulations for Preventing Collisions at Sea, 16 U.S.T. 794, and expressly to the problem of oil pollution, e.g. the International Convention for the Prevention of Pollution of the Sea by Oil, 12 U.S.T. 2989 as amended at 17 U.S.T. 1523, International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 26 U.S.T. 765, International Convention For Civil Liability for Oil Pollution Damage, 1969, 9 *Int'l Legal Mats.* 45 (1970), International Convention for Prevention of Pollution from Ships, 1973 (known as the 1973 Maritime Pollution Convention), 12 *Int'l Legal Mats.* 1319 (1973), and International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, 11 *Int'l Legal Mats.* 285 (1972).

Many of these agreements are in force as international treaties and have been ratified by the United States. Some of the more recent agreements are currently pending before Congress and are expected to come into force in the future.

The United States has been diligent in working within IMCO to develop a sound system of international rules to promote safety and to reduce oil pollution and to have that system adopted by all major maritime nations. The most recent negotiations in this area produced the 1973 Marine Pollution Convention which establishes very strict limitations on the amount of oil discharge permitted during normal operations and imposes design and construction standards to reduce normal and accidental discharges. On March 22, 1977, President Carter transmitted the 1973 Marine Pollution Convention to the Senate for Advice and Consent. In his transmittal letter, President Carter stated that the convention:

deals comprehensively with operational discharges from vessels, establishes strict controls over oil discharges, and imposes regulations for discharges of other pollutants. It also creates standards for the construction and design of ships which will carry these hazardous cargoes.

I feel that entry into force of this Convention will be an important step in controlling and preventing pollution from vessel discharges. Message from The President of the United States transmitting The International Convention For The Prevention of Pollution From Ships, 13 Weekly Comp. of Pres. Doc. 422 (Mar. 22, 1977).

The Coast Guard, the agency within the United States that has the major responsibility for developing and policing maritime safety and pollution regulations, believes that it is in the interest of the United States to encourage all major maritime states to adhere to the 1973 Marine Pollution Convention (A. 217-221). As reflected in the Coast Guard Environmental Impact Statement, the achievement of that objective requires

good faith cooperation of all nations and in particular the willingness of the United States to accept the compromises that are inherent in any negotiation (A. 215-225, 285).

The Federal Government, and only the Federal Government, is entitled to conduct the foreign affairs of the United States. *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942); *Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948). As a consequence, any state law that interferes with the foreign affairs authority of the Federal Government must give way under the Supremacy Clause. U.S. Const., Art. VI, Clause 2. *Hines v. Davidowitz*, 312 U.S. 52 (1941). This is true even when there is no Federal legislation or formal treaty governing the situation.

In *Zschernig v. Miller*, 389 U.S. 429 (1967), this Court struck down an Oregon inheritance law on the sole ground that the law involved the state in making judgments concerning the nature of foreign governmental systems and that such actions created a serious possibility of embarrassing the United States in its relations with the foreign nations affected. The court stated:

The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. [Citation omitted.] Where those laws conflict with a treaty, they must bow to the superior federal policy. [Citation omitted.] Yet, even in absence of a treaty, a State's policy may disturb foreign relations. . . . The present Oregon law is not as gross an intrusion in the federal domain as

those others might be. Yet, as we have said, it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.

The Oregon law does, indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy. 389 U.S. 429, 440-441 (1967).

Applying these principles, the State of Washington must refrain from taking actions that will interfere with the foreign policy objectives of the United States to obtain international agreement relating to the use of the world's ocean areas and to the construction and operation of tankers. Although the United States may ultimately decide to pursue a unilateral approach to the regulation of oil tanker design and equipment, such a decision will clearly affect United States relations with other maritime countries, and the decision to embark upon that course must be reserved to the Federal Government. Only in that way can the multiple interests of the United States be protected. In the realm of foreign relations the United States must have a single and effective voice. The State of Washington cannot be permitted to enact legislation that interferes with the ability of the United States to participate in international agreements relating to the regulation of oil tankers.

CONCLUSION

For reasons given above, Washington's Tanker Law constitutes an impermissible intrusion into an area that has been preempted by the Federal Government, an unconstitutional regulation of foreign and interstate commerce and an unconstitutional interference with the responsibility of the Federal Government for the conduct of foreign relations. Consequently, the judgment of the District Court should be affirmed.

Respectfully submitted,

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